UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GARY RICHARD BROWN, Plaintiff, vs. HY-VEE, INC., Defendant.	No. C02-3041-PAZ **ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the court on the motion of the defendant Hy-Vee, Inc. ("Hy–Vee") for summary judgment. Hy-Vee filed its motion, statement of material facts, appendix, and supporting brief on September 15, 2003. (Doc. No. 21) The plaintiff Gary Richard Brown ("Brown") filed a resistance to the motion, a brief in support of the resistance, and a statement of disputed material facts on October 14, 2003. (Doc. No. 25) On October 22, 2003, Hy-Vee filed a reply brief and a supplemental appendix. (Doc. No. 27) The court has reviewed all of the parties' filings, and finding this matter to be ready for decision, turns to consideration of the issues raised by Hy-Vee in its motion.

I. INTRODUCTION

In this action, Brown asserts claims for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 623, *et seq*. ("ADEA") (Count I); sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII") (Count II); and both age and sex discrimination under the Iowa Civil Rights Act of 1965, as amended, Iowa Code chapter 216 (1997) ("ICRA") (Count III).

On May 18, 2001, prior to filing this action, Brown filed a complaint with the Iowa Civil Rights Commission ("ICRC") alleging age and, arguably, sex discrimination. On February 28, 2002, the ICRC issued Brown a right-to-sue letter, but Brown did not file this action until June 03, 2002. Under Iowa Code § 216.16(3), any action authorized by the ICRA must be commenced within 90 days after the issuance of the right-to-sue letter. Brown acknowledges his State cause of action (Count III) was not filed timely, and he asks that Count III of the Complaint be dismissed. Accordingly, Hy-Vee's motion for summary judgement is **granted** as to Count III.

II. FACTUAL BACKGROUND

The following facts are undisputed, except as otherwise noted. Hy-Vee is a grocery store chain with stores throughout Iowa, and in other states. Brown is a Caucasian male, who was born on February 19, 1944. He first was employed by Hy-Vee in January 1970, as a shift manager at a store in Harlan, Iowa. In 1974, he was hired as an assistant store manager at a store in Algona, Iowa. In 1979, the Algona store moved to a larger location, with more departments and employees. The store manager was not satisfied with Brown's job performance, believing Brown lacked leadership skills and decision-making ability.

In February 1981, Brown left his job at the Algona store and began working in the produce department at a Sioux City Hy-Vee store.[1] He remained in that position until June 1982, when he was hired as a shift manager at the Hy-Vee store in Carroll, Iowa. In February 1983, he became the frozen food manager at the Carroll store, and in February 1984, he was promoted to the position of assistant store director.[2] In October 1989, Randy Hockom ("Hockom") became the store director of the Carroll Hy-Vee store. In November 1991, during the process of planning a move to a larger building, Hockom demoted Brown to the position of general merchandise manager. Hockom made this change because he believed Brown's leadership skills were not strong enough for an assistant store director position at a larger store. In his new position, Brown reported to the store director and the assistant store directors. One of the employees Brown supervised in his new position was Katie Weeks ("Weeks"), who had been working as a clerk in the health and beauty products department at the store since 1982.

The parties sharply dispute the quality of Brown's performance as general merchandise manager. Hy-Vee claims Brown's performance was poor, particularly in the areas of organization, supervision, record keeping, and inventory control. Brown argues any problems in these areas originated from others at Hy-Vee. He claims products were ordered without his knowledge or input, management failed to provide enough display space for general merchandise, and his time was diverted to other duties at the store.

On February 8, 2001, Brown was demoted to an assistant manager position with the title of "Front End Manager." After Brown's demotion, from February 8-19, 2001, the

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[1]The parties disagree as to whether Brown's employment at the Algona store was terminated, or he transferred to the Sioux City store for personal reasons.

[2]About that time, the terminology for the top positions at Hy-Vee changed from "manager" to "director."

general merchandise manager position was posted within the store and on the company-wide intranet. Two employees applied – Weeks and Vickie Johnson, both from the Carroll store. On February 26, 2001, Weeks was hired for the position, although the responsibilities of the position were restructured somewhat.

Hy-Vee asserts the employment action taken to relieve Brown of his position as general merchandise manager was in no part motivated by considerations of age or sex. In response, Brown asserts, with little or no support in the record, that Hy-Vee made a conscious decision, based on Brown's age and sex, to replace him as the general merchandise manager. He further claims Weeks was pre-selected to replace him, and he was set up to fail in the position of general merchandise manager so that Hy-Vee would be justified in replacing him with Weeks.[3]

On May 18, 2001, Brown file a complaint with the ICRC. On a copy of the form provided to the court by Brown, where the claimant indicates the bases of the claimed discrimination, the boxes for "age," "sex," and "retaliation" all are checked. On the copy of the same form provided to the court by Hy-Vee, the only boxes checked are "age" and "retaliation." Brown asserts "sex" was checked on the form he submitted to the ICRC, and someone at the ICRC must have removed the checkmark.

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[3]These are just a few of the numerous assertions in Brown's statement of disputed material facts that are not supported by a citation to the record or any appendix, as required by the rules. *See* LR 56.1(b)(4). Also, the Local Rules provide: "A response to an individual statement of material fact that is not expressly admitted must be supported by references to those specific pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits that support the resisting party's refusal to admit the statement, with citations to the appendix containing that part of the record. The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." LR 56.1(b). Brown has failed to cite to these types of support for his responses to Hy-Vee's factual assertions.

Similarly, where Brown cites to depositions and other materials, he often does not provide the court with a copy of those materials. For example, he cites to "Hockom dep. P. 114" for the proposition that Hy-Vee's CEO actively encouraged the hiring of women in management positions. (Brown's statement of disputed material facts, p. 8) The court has not been provided with this deposition page.

The copy of the complaint form submitted to the court by Brown is not supported by a declaration or sworn evidence; it simply is attached to a court filing. The form is not signed by Brown. The form submitted to the court by Hy-Vee is signed by Brown. It also is attested to as genuine by the supervisor of intake at the ICRC, who swears under oath that the custom, practice, and procedure of the ICRC is to have a receipt stamp placed on all such complaints when they are received. Such a stamp appears on Hy-Vee's copy of the complaint, but not on Brown's copy. The intake supervisor further swears that when a complaint is received at the ICRC, intake information is placed on complaints by agency intake representatives. Such information appears on Hy-Vee's copy of the complaint, but not on Brown's copy.

On this record, the court accepts as genuine the copy of the complaint form submitted by Hy-Vee.

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment, and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. Fed. R. Civ. P. 56(a) & (b). Rule 56 further states that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*.

Fed. R. Civ. P. 56(c) (emphasis added). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn

from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [its] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56],[4] must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e); *Lockhart*, 963 F. Supp. at 814 (citing *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has explained the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). Furthermore, the Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue for trial exists, rather than "weigh the evidence and determine the truth of the matter." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 249,

[4] *E.g.*, by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Fed. R. Civ. P. 56(e).

106 S. Ct. at 2510-11; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; and *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

Thus, if Hy-Vee shows no genuine issue exists for trial, and if Brown cannot advance sufficient evidence to refute that showing, then Hy-Vee is entitled to judgment as a matter of law, and the court must grant summary judgment in Hy-Vee's favor. If, on the other hand, the court "can conclude that a reasonable trier of fact could return a verdict for [Brown], then summary judgment should not be granted." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)

Special care must be given to summary judgment motions in employment discrimination cases. As the Honorable Mark W. Bennett explained in *Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896, 900-901 (N.D. Iowa 1999):

> The court has often stated that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L. Ed. 2d 774 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1204 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) ("summary judgments should only be used sparingly in employment discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364).

Thus, summary judgment is rarely appropriate in employment discrimination cases, and should be granted only in "'those rare instances where there is no dispute of fact and where there exists only one conclusion.'" *Id.* (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244)). Judge Bennett further explained:

> To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford[*, 37 F.3d at 1341]); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

Keeping these standards in mind, the court now will address Hy-Vee's motion for summary judgment.

IV. LEGAL ANALYSIS

A. Brown's Age Discrimination Claims Under the ADEA

Hy-Vee argues it is entitled to summary judgment on Brown's age discrimination claim. Brown responds that his age discrimination claim presents genuine issues of fact for trial.

The ADEA makes it unlawful for employers to discriminate on the basis of an individual's age if the individual is over 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a). A plaintiff may demonstrate age discrimination by either direct or indirect evidence. *Montgomery v. John Deere & Co.*, 169 F.3d 556, 559 (8th Cir. 1999); *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). The appropriate analysis for ADEA cases where, as here, there is no direct evidence of age discrimination, is the burden-shifting framework the Supreme Court developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). *See Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) ("This mode of analysis, while developed in the Title VII context, applies with equal force to ADEA cases."); *see generally Ryther v. KARE 11*, 108 F.3d 832, 835-37, 844 (8th Cir.1997) (*en banc*).

The Eighth Circuit described this burden-shifting analysis in the context of age discrimination cases in *Berg v. Bruce*, 112 F.3d 322 (8th Cir. 1997):

> Under this analysis the plaintiff has the initial burden of establishing a *prima facie* case of discrimination, which "creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The burden of production then shifts to the employer to rebut the presumption by producing evidence showing a legitimate non-discriminatory reason for its action. *Id*. at 253, 101 S. Ct. at 1093-94. If the defendant carries this burden, the burden shifts back to the plaintiff to show that the employer's proffered reason is merely a pretext for discrimination. *Id*. The plaintiff retains the burden of persuasion at all times and accordingly the plaintiff must present sufficient evidence to persuade the trier of fact that the adverse employment action was motivated by intentional discrimination. *Id*.

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> To establish a prima facie case of age discrimination under *McDonnell Douglas*, a plaintiff must prove that (1) he was in the age group protected by the Age Discrimination Act (40 or older, 29 U.S.C. § 631); (2) at the time of his discharge or demotion he was performing his job at a level that met his employer's legitimate expectations; (3) adverse employment action occurred; and (4) following his discharge or demotion, plaintiff was replaced by someone with comparable qualifications. *See Hutson v. McDonnell Douglas*, 63 F.3d 771, 776 (8th Cir. 1995) (quoting *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994)); *see also O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, ___ - ___, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 (1996) (outlining elements of *prima facie* case for claims of race discrimination and age discrimination).
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> The burden then shift[s] to the defendants to show a legitimate non-discriminatory reason for terminating [the plaintiff]. . . . The burden then shift[s] back to [the plaintiff] to show that the defendants' assertion that [the plaintiff] was terminated for cause was a pretext to cover age discrimination. To defeat the motion for summary judgment, [the plaintiff is] required to "set forth specific facts showing that there is a genuine material issue [regarding age discrimination] that requires a trial." *Roxas v. Presentation College*, 90 F.3d 310, 315 (8th Cir. 1996).

Berg, 112 F.3d at 326-27; *see Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896, 906-09 (N.D. Iowa 1999).

Brown was 56 years old when he was demoted, and thus was in the age group protected by the ADEA. He suffered adverse employment action, and subsequently was replaced by a younger individual with less training and experience. However, Hy-Vee

argues that at the time of his discharge, Brown was not performing his job at a level that met Hy-Vee's legitimate expectations. Brown responds that the reason for his substandard performance was Hy-Vee's failure to allow him to perform his job properly, a failure Brown attributes to discrimination due to his age.

On this record, Brown arguably has established a *prima facie* case of age discrimination. He has established that when he was demoted, he was in the age group protected by the ADEA. Arguably, at the time of his demotion, he was performing his job at a level that met his employer's legitimate expectations.[5] When Brown was demoted, an adverse employment action occurred. Finally, following Brown's demotion, he was replaced by someone with comparable, or less, qualifications.

Having determined that Brown has established a *prima facie* case of age discrimination, Hy-Vee must offer a legitimate, non-discriminatory reason for demoting Brown. To meet this burden, Hy-Vee has submitted evidence that Brown's job performance was poor, particularly in the areas of organization, supervision, record keeping, and inventory control. This shifts the burden back to Brown, who must set forth specific facts showing the existence of a genuine, material issue of fact regarding whether Hy-Vee's proffered reasons for his demotion were merely a pretext for age discrimination. Brown has failed to present any affirmative evidence to meet his burden of persuasion on this issue. In fact, except for making arguments that are unsubstantiated in the record, Brown has failed to point to anything to show Hy-Vee discriminated against him on the

[5]This element of Brown's *prima facie* case is called into question by his failure to submit any verified material to rebut Hy-Vee's evidence that Brown was not performing his job satisfactorily. Instead, Brown argues his performance reviews demonstrate that his performance was adequate. (*See* Brown's brief, pp. 6-7) For purposes of determining whether Brown has presented a *prima facie* case of age discrimination, the court will assume Hy-Vee's evidence is insufficient to show Brown's performance was inadequate at the time he was demoted.

basis of his age. He certainly has failed to present direct evidence demonstrating "a specific link between the challenged employment action and the alleged animus." *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 835 (8th Cir. 2000); *see Bauer*, 59 F. Supp. 2d at 909. He similarly has presented no circumstantial evidence giving rise to an inference that age was a factor in his demotion.

Liability for age discrimination depends upon whether age actually motivated the employer's decision to take the adverse employment action. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *accord Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 321 (7th Cir. 2003). The record in this case does not even suggest that age was a factor in Brown's demotion. Brown has failed to establish that a genuine, material issue of fact exists regarding age discrimination. Accordingly, Hy-Vee is entitled to summary judgment on this claim.

C. Brown's Sex Discrimination Claim

Brown failed to exhaust his sex discrimination claim against Hy-Vee. Therefore, Hy-Vee is entitled to summary judgment on this claim. *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 223 (8th Cir. 1994); *see Burkett v. Glickman*, 327 F.3d 658, 660 (8th Cir. 2003) ("Before the federal courts may hear a discrimination claim, an employee must fully exhaust [his] administrative remedies.").

IV. CONCLUSION

Based upon the foregoing analysis, Hy-Vee's motion for summary judgment (Doc. No. 8) is **granted**. Judgment will be entered in favor of Hy-Vee and against Brown.

IT IS SO ORDERED.

DATED this 18th day of November, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT